Before the
Administrative Hearing Commission
State of Missouri

CIRCUIT CITY STORES, INC.,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 10-2239 RS
	)	
DIRECTOR OF REVENUE,	)	
	)	
Respondent.	)	

DECISION

Circuit City Stores, Inc. ("Circuit City") is entitled to a refund of overpaid sales tax in the amount of $145,581.68.

Procedure

On December 3, 2010, Circuit City filed a complaint appealing the final decision of the Director of Revenue ("Director") denying a sales tax refund. The Director filed his answer on December 30, 2010.

This Commission convened a hearing on the complaint on January 17, 2013. Khristine A. Heisinger of Stinson, Morrison, Hecker LLP and H. Timothy Gillis of Akerman Senterfitt represented Circuit City. Thomas A. Houdek represented the Director.

The matter became ready for our decision on May 13, 2013, when the Director filed his final written argument. Commissioner Sreenivasa Rao Dandamudi, having read the full record including all the evidence, renders the decision.[1]

Findings of Fact

A. BACKGROUND

1. Circuit City was a Virginia corporation registered with the Director to sell tangible personal property ("merchandise") in Missouri at all times relevant to these findings.

2. Circuit City remitted sales tax to the Director on all taxable merchandise sold in Missouri. Sales tax was assessed on the purchase price, including credit sales. The relevant period of sales tax is January 1, 2007 through April 30, 2010 ("tax period").

B. PRIVATE LABEL CREDIT CARD

3. On January 16, 2004, in order to provide financing to its customers, Circuit City entered into an agreement with Bank One Delaware, NA to create a Circuit City private label credit card ("PLCC"). Circuit City continued this agreement with JP Morgan Chase Bank NA, the successor bank to Bank One Delaware, NA (both banks collectively referred to as "PLCC Bank"). A PLCC is a credit card that can typically only be used at one store and its affiliates.

4. In order to obtain a Circuit City PLCC, its customers completed and submitted an application to the PLCC Bank. The PLCC Bank reviewed the completed applications and determined whether to approve or deny. If approved, the PLCC Bank issued the customer a Circuit City PLCC. The PLCC Bank is the owner of the Circuit City PLCC accounts.

5. At the time of making a purchase with a Circuit City PLCC, the customer received the merchandise, and Circuit City remitted the sales tax due on that merchandise. The PLCC

[1]Section 536.080.2; ***Angelos v. State Bd. of Regis'n for the Healing Arts***, 90 S.W.3d 189 (Mo. App. S.D. 2002). Statutory references are to RSMo 2000, unless otherwise noted.

Bank reimbursed Circuit City for the purchase price and applicable sales tax after making adjustments to account for financial obligations between the PLCC Bank and Circuit City. These financial obligations included discounts and rebates, among other obligations.

6. Some Circuit City PLCC cardholders defaulted on their payment obligations. After unsuccessful attempts to collect these past due amounts, the PLCC Bank charged them off as bad debts. It then deducted these bad debts, for purposes of federal income tax, under 26 USC § 166.[2] The charged-off bad debts included payment for merchandise and payment of sales tax.

C. AMOUNT OF CHARGED-OFF SALES TAX

7. Circuit City calculated the amount of charged-off sales tax for the tax period through extrapolation.

1. January 1, 2007 – December 31, 2008

8. First, Circuit City had data on the amount of actual charged-off sales tax on some accounts for 2007 and 2008. The actual amount of charged-off sales tax for these accounts totaled $73,362.32.

9. Second, Circuit City calculated an effective sales tax rate of 5.4% to use in calculating charged-off sales tax on its remaining accounts for 2007 and 2008.

10. Circuit City calculated the effective sales tax rate by gathering data on all actual transactions ($1,603,071.09) charged off as bad debts and all actual sales tax amounts ($86,507.33) charged off as bad debt for 2007 and 2008. Circuit City divided the actual sales tax amount charged off by the actual total transactions charged off to calculate the effective sales tax rate of 5.4%. This effective sales tax rate differs from the statutory sales tax rate because it accounts for both taxable and nontaxable sales.

[2] United States Code.

11. For the accounts where Circuit City did not have data on the amount of actual charged-off sales tax, the effective sales tax rate of 5.4% was used to calculate charged-off sales tax. This calculated charged-off sales tax totaled $13,986.69 for 2007 and 2008. The amount of charged-off sales tax using the effective sales tax rate ($13,986.69) was added to actual charged-off sales tax ($73,362.32) to determine a total charged-off sales tax amount of $87,349.01 for 2007 and 2008.

2. Extrapolation

12. Circuit City extrapolated the 2-year charged-off sales tax amount of $87,349.01 over the entire period to calculate a total charged-off sales tax amount of $145,581.68.

D. REQUEST FOR SALES TAX REFUND

13. On May 28, 2010, Circuit City submitted its application for a sales tax refund.

14. On October 5, 2010, the Director issued his final decision denying Circuit City's application for a sales tax refund.

Conclusions of Law

We have jurisdiction over appeals from the Director's final decisions.[3] Our duty in a tax case is not to review the Director's decision, but to find the facts and to determine, by the application of existing law to those facts, the taxpayer's lawful tax liability for the period or transaction at issue.[4] Statutes imposing a tax must be strictly construed in favor of the taxpayer.[5] Circuit City has the burden of proof.[6]

[3]Section 621.050.1.

[4]***J.C. Nichols Co. v. Director of Revenue***, 796 S.W.2d 16, 20-21 (Mo. banc 1990).

[5] Section 136.300.1; *see also* ***American Healthcare Management, Inc. v. Director of Revenue***, 984 S.W.2d 496, 498 (Mo. banc 1999).

[6]Section 621.050.2.

The statute providing for a refund on overpayment of sales tax, § 144.190,[7] provides:

> 2. If any tax, penalty or interest has been paid more than once, or has been erroneously or illegally collected, or has been erroneously or illegally computed, such sum shall be credited on any taxes then due from the person legally obligated to remit the tax pursuant to sections 144.010 to 144.525, and the balance, with interest as determined by section 32.065, shall be refunded to the person legally obligated to remit the tax, but no such credit or refund shall be allowed unless duplicate copies of a claim for refund are filed within three years from date of overpayment.

The regulation that further explains how to claim a refund on overpayment of sales tax due to bad debts, 12 CSR 10-102.100,[8] provides:

> (1) In general, a seller may file for a credit or refund within the three-year statute of limitations when sales are written off as bad debts.
>
> (2) Definition of Terms.
>
> (A) Bad debt is a sale that has been written off for state or federal income tax purposes. In order to qualify for a bad debt deduction for sales or use tax purposes, a sale must have been previously reported as taxable.
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> (B) Accrual or gross sales reporting method means a seller reports the sale and remits the tax at the time of the sale. The receipts are not received from the buyer until a later date. Therefore, a timing difference occurs between the time that the sale, with applicable sales tax, is reported to the state and the time that the seller receives payment from the buyer.
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> (3) Basic Application of the Law.
>
> (A) A seller may file for a refund or credit within the three-year statute of limitations for those sales written off as bad debts if the sales were reported using the accrual or gross sales method. This period is calculated from the due date of the return or the date the tax was paid, whichever is later.

[7] RSMo Supp 2012.

[8] All references to "CSR" are to the Missouri Code of State Regulations, as current with amendments included in the Missouri Register through the most recent update, unless otherwise specified.

The relevant definitions are provided by § 144.010:[9]

> 1. The following words, terms, and phrases when used in sections 144.010 to 144.525 have the meanings ascribed to them in this section, except when the context indicates a different meaning:
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> * * *
>
> (6) "Person" includes any individual, firm, copartnership, joint adventure, association, corporation, municipal or private, and whether organized for profit or not, state, county, political subdivision, state department, commission, board, bureau or agency, except the state transportation department, estate, trust, business trust, receiver or trustee appointed by the state or federal court, syndicate, or any other group or combination acting as a unit, and the plural as well as the singular number;
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> * * *
>
> (11) "Seller" means a person selling or furnishing tangible personal property or rendering services, on the receipts from which a tax is imposed pursuant to section 144.020[.]

A. Issues

This case raises two issues. First, whether Circuit City is eligible for a sales tax refund on bad debts written off, for federal income tax purposes, by the PLCC Bank. There is no dispute that Circuit City was legally obligated to remit sales tax pursuant to §§ 144.010 to 144.525, which is a requirement for a sales tax refund under §144.190. There is also no dispute that Circuit City's application for a sales tax refund was timely submitted pursuant to 12 CSR 10-102.100. Second, whether Circuit City may determine the amount of overpaid sales tax through extrapolation.

B. Circuit City's Eligibility for a Sales Tax Refund

This is an issue of first impression in Missouri. Circuit City argues that under the plain reading of 12 CSR 10-102.100(3)(A), it is entitled to a refund because it met both requirements:

[9] RSMo Supp. 2005.

it reported and remitted sales tax at the time of sale, thus falling under the definition of accrual or gross sales method; and the sales were written off as bad debts.

Because refund provisions are strictly construed against the taxpayer,[10] the Director argues Circuit City is not eligible for a refund because it was not the entity that incurred the bad debt from the sales that were eventually written off for income tax purposes. The Director supports this argument by analyzing cases from different states: ***In re Sales Tax Claim of the Home Depot v. Oklahoma Tax Commission***,[11] ***Home Depot USA, Inc. v. Indiana Dep't. of State Revenue***,[12] ***Home Depot USA, Inc. v. Levin***,[13] ***Home Depot USA, Inc. v. Dep't. of Rev.***,[14] and ***Home Depot USA, Inc. v. Director, Div. of Taxation***.[15] In each of these five cases, the court found against a taxpayer that sought a refund of sales tax when bad debt was written off of a third party's income tax. The Director simply listed twelve other cases from different states for our reference.

Circuit City counters that the cases presented by the Director in his argument differ from the facts before us. Specifically, Circuit City argues that the statutes or regulations at issue in the Director's supportive case law require the taxpayer to be the same entity that writes off the bad debt, whereas as 12 CSR 10-102.100(3)(A) has no such requirement. In support of its claim for a sales tax refund, Circuit City provided ***Home Depot USA, Inc. v. State of Michigan and State Treasurer***.[16] Therefore, we compare the statute or regulation at issue in each of the above referenced cases with 12 CSR 10-102.100(3)(A). Because several of the taxpayers in these cases have similar names, we refer to each case by the state in which the opinion was issued.

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[10] ***Ford Motor Co. v. Director of Revenue***, 97 S.W.3d 458, 461 (Mo. banc 2003).
[11] 198 P.3d 902 (Okla. Civ. App. 2008).
[12] 891 N.E.2d 187 (In. Tax Court 2008).
[13] 905 N.E.2d 630 (Ohio 2009).
[14] 215 P.3d 222 (Wash. Ct. App. 2009).
[15] 25 N.J. Tax 221 (Super. Ct. App. 2009).
[16] 2012 WL 1890219 (Mich.App. 2012).

We address all eighteen cases, cited by the Director and Circuit City, below. First, we divide them into three categories. In category 1, we review the cases where a sales tax refund was sought by finance companies rather than the taxpayer. In category 2, we review the cases where the taxpayer sought a sales tax refund, but the statute or regulation at issue differs from Missouri. In category 3, we review the cases where the taxpayer sought a sales tax refund and the statute or regulation at issue is similar to Missouri. Within each category, we address the cases in chronological order.

1. Category 1 – Finance Company Cases

In ***DaimlerChrysler Services North America, LLC v. State Tax Assessor***,[17] a finance company attempted to obtain a sales tax refund. In this case, customers purchased motor vehicles from taxpayers on finance. These taxpayers were local motor vehicle retailers. The amount financed included both purchase price and sales tax of the vehicles. The taxpayer remitted the vehicle sales tax and assigned the financing contract to DaimlerChrysler. DaimlerChrysler charged off some amounts and requested a sales tax refund. The two issues before the Maine Supreme Court in this case were whether the statute allowed for a sales tax refund and whether only the taxpayer is permitted to benefit from the sales tax statute at issue. The Court held that only the taxpayer could benefit from the sales tax statute at issue and that the plain reading of the statute allows only for a credit of sales tax and not a refund. While this case looks at the issue before us, it does so from a different perspective. Therefore, we are unable to gain a meaningful analysis from this case to assist our decision.

Appeal of Ford Motor Credit Company from a Denial of Refund of Kansas Retailers' Sales Tax[18] is another case where a finance company attempted to obtain a sales tax refund.

[17] 817 A.2d 862 (Me. 2003).
[18] 69 P.3d 612 (Kan. 2003).

Like the Maine case, customers purchased motor vehicles on finance from taxpayers who were local retailers. The financing included both the sale price of the vehicle and sales tax. The taxpayers remitted the sales tax and assigned the financing contracts to Ford Motor Credit. Ford Motor Credit wrote off some of the assigned contracts as uncollectible debt and filed for a refund of sales tax paid. The statute at issue in this case stated that the retailer may obtain a refund for sales tax paid on bad debts. The issue before the Kansas Supreme Court was whether the assignment of financing contracts to Ford Motor Credit also assigned the sales tax refund to Ford Motor Credit. The Court held that the sales tax refund was not assigned to Ford Motor Credit. Again, while this case looks at the issue before us, it does so from a different perspective. Therefore, we are unable to gain a meaningful analysis from this case to assist our decision.

General Electric Capital Corp. v. New York State Division of Tax Appeals[19] is another case where a finance company attempted to obtain a sales tax refund. Here, General Electric provided financing to customers through PLCCs issued by the taxpayers, who were retail vendors. When customers made a purchase with their PLCC, the taxpayers remitted sales tax due on the merchandise. General Electric charged off uncollectable amounts due from customers as bad debts and filed claims for sales tax refunds with the state's Division of Taxation. The Division of Taxation denied the refund claims. In this case, the regulation at issue expressly precluded third-party assignees, such as General Electric, from applying for a sales tax refund. The issue before the New York Court of Appeals was whether the Division of Taxation exceeded its authority by denying the sales tax refund under the theory that this regulation was not authorized by statute. The New York Court of Appeals held that the regulation was authorized by statute and that General Electric was not eligible for a sales tax refund. Again, while this case

[19] 810 N.E.2d 864 (Ny. 2004).

looks at the issue before us, it does so from a different perspective. Therefore, we are unable to gain a meaningful analysis from this case to assist our decision.

Department of Taxation v. DaimlerChrysler Services North America, LLC,[20] is yet another case where a sales tax refund was sought by a finance company. The Nevada Supreme Court clearly summarized the facts, statute, issue, and holding in the first two sentences:

> In this case, we consider whether a person who provides primary financing of a retail sale may exercise the retailer's right to sales tax refunds from the State under Nevada's bad-debt statute, NRS 372.365(5). We conclude that the statute unambiguously precludes a finance company from obtaining tax refunds and therefore reverse.[[21]]

Again, because the issue concerns refunds to the finance company rather than the taxpayer, we are unable to gain a meaningful analysis from this case to assist our decision.

The next case, in chronological order, provided by the Director, is ***DaimlerChrysler Services North America LLC v. Wisconsin Department of Revenue***.[22] Again, this is a case of a finance company seeking a sales tax refund or deduction[23] on uncollected bad debt where the sales tax was remitted by a separate taxpayer/vendor. For the same reason as the prior cases, we are unable to gain a meaningful analysis from this case to assist our decision.

The next case provided by the Director is ***Household Retail Services, Inc. v. Commissioner of Revenue***.[24] Once again, this case does not provide a meaningful analysis to assist our decision because it concerns denial of a sales tax refund to a finance company rather than the taxpayers, who in this case were furniture retailers, who remitted sales tax.

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[20] 119 P.3d 135 (Nv. 2005).
[21] *Id*. at 135.
[22] 726 N.W.2d 312 (Wis. Ct. App. 2006).
[23] The underlying record is unclear as to whether the finance company sought a deduction or refund of sales tax, and the Court stated that it was irrelevant in issuing its opinion.
[24] 859 N.E.2d 837 (Ma. 2007).

MFC Finance Company of Texas v. Strayhorn[25] is another case where a finance company purchased installment sales contracts from taxpayers who were retail motor vehicle dealers. The financing contract includes sales tax, which was remitted by the taxpayers. The finance company wrote off uncollectable accounts as bad debts and unsuccessfully attempted to claim a sales tax refund on the bad debt. As such, it does not provide us with a meaningful analysis to assist our decision.

Citibank (South Dakota), N.A. v. Graham[26] is another case where a finance company, that also happened to be a PLCC issuer, unsuccessfully attempted to obtain a sales tax refund. For the same reason as the prior cases, the analysis here does not assist us in our decision.

2. Category 2 – Taxpayer Seeks Refund, Statute or Regulation not on Point

In ***In re Sales Tax Claim for Refund of the Home Depot v. Oklahoma Tax Commission***,[27] the taxpayer remitted sales tax on merchandise sold at retail, to accounts on credit. These accounts on credit were owned by a PLCC issuer. Some of these accounts were uncollectable and deducted as bad debt on the PLCC issuer's federal income tax. The taxpayer requested a refund of sales tax paid on these bad debts. The statute at issue, 68 O.S.2001 § 1366,[28] provides:

> A. There is herein provided a deduction to the vendor from taxable sales for bad debts. Any deduction taken that is attributed to bad debts shall not include interest.
>
> * * *
>
> C. Bad debts may be deducted on the return for the period during which the bad debt is written off as uncollectible **in the claimant's books and records** and is eligible to be deducted for federal income tax purposes[.] [Emphasis added.]

[25] 2008 WL 1912265 (Tx. Ct. App. 2008).
[26] 726 S.E.2d 617 (Ga. Ct. App. 2012).
[27] 198 P.3d 902 (Okla. Civ. App. 2008).
[28] Oklahoma Statutes Annotated (2003).

This statute indirectly required the taxpayer, as claimant of the sales tax refund, to be the entity that deducted bad debts from its federal income tax. Accordingly, the Oklahoma Court of Civil Appeals held:

> Section 1366 implicitly requires the owner of the bad debt account to be the entity allowed the deduction where it also requires the owner to report subsequent collections of bad debt accounts as income.[29]

The requirement that the taxpayer be the entity that deducts bad debts from its income tax is not present in 12 CSR 10-102.100(3)(A). Therefore, while the case is factually relevant, the legal issue is not on point because the statute at issue differs from 12 CSR 10-102.100(3)(A).

In ***Home Depot USA, Inc. v. Indiana Dep't. of State Revenue***,[30] the taxpayer remitted sales tax on merchandise sold at retail, to accounts on credit. These accounts on credit were owned by a PLCC issuer. Some of these accounts were uncollectable and deducted as bad debt on the PLCC issuer's federal income tax. The taxpayer requested a refund of sales tax paid on these bad debts. The statute at issue, IC § 6-2.5-6-9,[31] provides:

> In determining the amount of [sales] tax[ ] which he must remit ... a retail merchant shall deduct from his gross retail income from retail transactions made during a particular reporting period, an amount equal to his receivables which:
>
> (1) resulted from retail transactions in which **the retail merchant did not collect** the [sales] tax from the purchaser;
>
> (2) resulted from retail transactions on which the retail merchant has previously paid the [sales] ... tax liability to the [D]epartment; and
>
> (3) were written off as an uncollectible debt for federal tax purposes during the particular reporting period.[32]

[29] 198 P.3d at 904.
[30] 891 N.E.2d 187 (In. Tax Court 2008).
[31] Indiana Code (2002).
[32] 891 N.E.2d at 189-190 (emphasis added).

This statute requires the taxpayer, as the retail merchant, to be the entity that did not collect the sales tax. The Indiana Tax Court in this case, quoting the Indiana Supreme Court's prior opinion interpreting this statute, held:

> "[i]f the Legislature did not want [the retail merchant] to use Internal Revenue Code Section 166 mathematics [in calculating the amount of the deduction], [ ] it would not have referenced federal tax law at all; it would have simply provided that the receivables were written off as an uncollectible debt."[33]

This reasoning is similar to Circuit City's argument that the plain reading of 12 CSR 10-102.100(3)(A) simply provides that sales be written off as bad debt. The Indiana Tax Court went on to agree with the Indiana Supreme Court by ruling:

> Thus, the Supreme Court implicitly acknowledged that under Indiana Code § 6-2.5-6-9(a)(3), when a retail merchant "writes off a receivable as an uncollectible debt for federal tax purposes," the retail merchant must write off the receivable as uncollectible debt for federal tax purposes[.]

CONCLUSION

> Home Depot would be entitled to the deduction under Indiana Code § 6-2.5-6-9 if it wrote off the uncollectible credit card accounts for federal tax purposes under section 166 of the Internal Revenue Code. [34]

Again, the statute at issue in this case required the taxpayer, as the retail merchant, to be the one that did not collect sales tax. This requirement that the taxpayer be the entity that is unable to collect sales tax is not present in 12 CSR 10-102.100(3)(A). Therefore, while the case is factually relevant, the legal issue is not on point because the statute at issue differs from 12 CSR 10-102.100(3)(A).

[33] 891 N.E.2d at 191, quoting ***Indiana Dep't of Revenue v. 1 Stop Auto Sales, Inc.***, 810 N.E.2d 686, 689 (Ind. 2004).

[34] *Id*. at 191.

In ***The Home Depot, Inc. v. Levin***,[35] the taxpayer remitted sales tax on merchandise sold at retail, to accounts on credit. These accounts on credit were owned by a PLCC issuer. Some of these accounts were uncollectable and deducted as bad debt on the PLCC issuer's federal income tax. The taxpayer requested a refund of sales tax paid on these bad debts. The statute at issue, R.C. 5739.121,[36] provides:

> (A) As used in this section, "bad debt" means any debt that has become worthless or uncollectible in the time period between a vendor's preceding return and the present return, has been uncollected for at least six months, and that may be claimed as a deduction pursuant to the "Internal Revenue Code of 1954," 68A Stat. 50, 26 U.S.C. 166, as amended, and regulations adopted pursuant thereto, or that could be claimed as such a deduction if the vendor kept accounts on an accrual basis. "Bad debt" does not include any interest or sales tax on the purchase price, uncollectible amounts on property that remains in the possession of the vendor until the full purchase price is paid, expenses incurred in attempting to collect any account receivable or for any portion of the debt recovered, and repossessed property.
>
> (B) In computing taxable receipts for purposes of this chapter, a vendor may deduct the amount of bad debts. **The amount deducted must be charged off as uncollectible on the books of the vendor.** [Emphasis added.]

This statute required the taxpayer, as the vendor, to be the entity that deducted bad debts from its income tax. Accordingly, the Ohio Supreme Court held:

> Because the statute's plain language limits the bad-debt deduction to a vendor that writes the debt off its own books, Home Depot is not entitled to the deduction in this case.[37]

The requirement that the taxpayer be the entity that deducts bad debts from its income tax is not present in 12 CSR 10-102.100(3)(A). Therefore, while the case is factually relevant, the legal issue is not on point before us because the statute at issue differs from 12 CSR 10-102.100(3)(A).

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[35] 905 N.E.2d 630 (Ohio 2009).
[36] Revised Code of Ohio (2003).
[37] 905 N.E.2d at 633-634.

In ***Home Depot USA, Inc. v. State Department of Revenue***,[38] the taxpayer remitted sales tax on merchandise sold at retail, to accounts on credit. These accounts on credit were owned by a PLCC issuer. Some of these accounts were uncollectable and deducted as bad debt on the PLCC issuer's federal income tax. The taxpayer requested a refund of sales tax paid on these bad debts. The statute at issue, RCW 82.08.037,[39] provides:

> A seller is entitled to a credit or refund for sales taxes previously paid on debts which are deductible as worthless for federal income tax purposes.

Similar to 12 CSR 10-102.100(3)(A), this statute did not explicitly require the taxpayer, as the seller, to be the entity that deducted bad debts from its federal income tax. Here, the Washington Court of Appeals looked to a Washington Supreme Court opinion that held:

> [B]ecause general assignment law allows the transfer of both contractual and statutory rights and liabilities, the dealers could also assign the "tax attribute" of "making sales at retail" to the bank, making it eligible for a sales tax refund.[40]

Unlike most other jurisdictions, in Washington, sales tax was considered assigned to the third-party finance company, which was eligible for the sales tax refund. Furthermore, the Washington Court of Appeals analyzed the federal bad debt statute, 26 U.S.C. § 166, by looking to two sources, both of which stated that under the federal bad debt statute, there must be:

> [A] "valid and enforceable obligation to pay a fixed or determinable sum of money" that subsequently becomes unrecoverable.[41]
>
> Further, "[o]nly a 'bona fide debt', i.e., one which 'arises from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money, qualifies for deduction."[42]

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[38] 215 P.3d 222 (Wash. Ct. App. 2009).
[39] Revised Code of Washington (2002).
[40] 215 P.3d at 227, citing ***Puget Sound National Bank v. Department of Revenue***, 868 P.2d 127 (1994).
[41] *Id*. at 228, citing ***8 Merten's Law of Fed. Income Tax'n*** § 30:4.
[42] *Id*. at 228, citing ***Zimmerman v. United States***, 318 F.2d 611, 612 (9th Cir. 1963).

Because Washington allows sales tax to be assigned and because the taxpayer no longer held a debt from the consumers, the Washington Court of Appeals held:

> Although the tax refund statute at issue does not explicitly contain a requirement that bad debts be deductible by the refund claimant, analysis of related federal and state tax laws demonstrates that the party seeking the deduction must be the one holding the bad debt as well as the one to whom repayment on such a debt would be made.[43]

However, the problem with looking to ***Zimmerman***, as the Washington Court of Appeals did, is that ***Zimmerman*** was a federal case where the issue was whether the taxpayers, a couple filing personal federal income taxes, qualified for a tax deduction for bad debt under 26 USC § 166. That is not an issue in the facts before us. There is no question as to whether Circuit City's PLCC Bank qualified for a bad debt deduction under 26 USC § 166. However, we are unaware of, and the parties have not provided, Missouri case law that allows a taxpayer to assign sales tax refunds to a PLCC bank. We are aware that § 144.190.4(1) provides a process for a taxpayer to assign sales tax refunds to a customer. Absent a similar provision for assignment to a PLCC issuer and absent Missouri case law on the subject, we conclude that assignment of sales tax refunds by the taxpayer to a PLCC issuer is not permitted in Missouri. As such, the legal analysis of the Washington Court of Appeals differs from Missouri statutes and regulations.

In ***The Home Depot, U.S.A., Inc. v. Director, Division of Taxation***,[44] the taxpayer, a retail merchant, sold merchandise at retail, to accounts on credit. The taxpayer then outsourced its accounts receivable to three separate finance companies and paid service fees ranging from 0 to 13.8%. The taxpayer received at least 86.2% of the purchase price on all merchandise sold on credit from the finance companies. Upon receipt of payment from the finance companies, the

[43] 215 P.3d at 228-229.
[44] 25 N.J. Tax 221 (Super. Ct. App. 2009).

taxpayer remitted sales tax on merchandise sold at retail, to accounts on credit. Some of these accounts were uncollectable, and the taxpayer sought a refund of sales tax. The regulation at issue, NJAC 18:24-23.2(a)(2),[45] provides:

> (a) Where the sales tax in connection with a sale has been remitted to the Division of Taxation and the account receivable has proven to be worthless and uncollectible, an application for a refund may be filed with the Director within four years from the payment thereof.
>
> * * *
>
> 2. Where a vendor has collected an amount with respect to the account receivable equal to or exceeding the amount of sales tax required to be remitted to the Division, the claim for refund will be denied.

Under this regulation, the New Jersey Superior Court held that the taxpayer was ineligible for a sales tax refund if it received at least an amount equal to the amount of sales tax. Furthermore, because the taxpayer received at least 86.2% of the purchase price of merchandise, it did receive, at a minimum, the amount of sales tax remitted. Therefore, it was ineligible to receive a sales tax refund under the regulation.[46] Furthermore, the statute that authorized this regulation, NJSA 54:32B-12(C),[47] provides:

> (c) The director may provide by regulation…for the exclusion from taxable receipts…sales where the contract of sale has been canceled…or the receipt, charge or rent has been ascertained to be uncollectible or, in the case the tax has been paid upon such receipt, charge or rent, for refund or credit of the tax so paid.

The Court held that this statute required the taxpayer to suffer an actual loss due to bad debts. Because the losses from the bad debts were suffered by the finance companies rather than

[45] New Jersey Administrative Code (1993).
[46] 25 N.J. Tax at 224-225.
[47] New Jersey Statutes Annotated.

taxpayer, the Court further held that the taxpayer was ineligible to receive a sales tax refund.[48] The requirements that the taxpayer receive less than the amount of sales tax remitted and suffer the loss from bad debts are not present in 12 CSR 10-102.100(3)(A). Therefore, while the case is factually relevant, the legal issue is not on point before us because both the regulation and statute at issue differ from 12 CSR 10-102.100(3)(A).

In ***Matter of Home Depot USA, Inc. v. Tax Appeals Trib. Of the State of N.Y.***,[49] the taxpayer remitted sales tax on merchandise sold at retail, to accounts on credit. These accounts on credit were owned by a PLCC issuer. The taxpayer paid the sales tax immediately – at the time of sale – rather than wait for payment from the PLCC issuer. Some of these accounts were uncollectable and deducted as bad debt on the PLCC issuer's federal income tax. The taxpayer requested a refund of sales tax paid on these bad debts. The regulation at issue, 20 NYCRR 534.7,[50] provides:

> (b) *Allowance of refund or credit.*
>
> (1) Where a receipt…has been ascertained to be uncollectible, either in whole or in part, the vendor of the tangible personal…may apply for a refund or credit of the tax paid on such receipt[.]
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> * * *
>
> (3) **A refund or credit is not available for a transaction which is financed by a third party** or for a debt which has been assigned to a third party, whether or not such third party has recourse to the vendor on that debt. [Emphasis added.]

This regulation excluded sales tax refunds when transactions were financed by a third party. In this case, the PLCC issuer was the third party. However, the taxpayer argued that the regulation

[48] 25 N.J. Tax at 225.
[49] 68 A.D.3d 1571 (Ny. 2009).
[50] N.Y. Comp. Codes R. & Regs. (1994).

allows for a distinction between transactions in which it paid sales tax from its own sales, as occurred in this case, versus sales tax paid from contractual payments received from the finance companies. The Appellate Division of the New York Supreme Court disagreed that this regulation allowed for a distinction between sales tax paid directly by the taxpayer rather than paid after the taxpayer received payment from the PLCC issuer. Accordingly, the Court ruled against the taxpayer.[51] The exclusion of sales tax refunds for transactions financed by a third party is not present in 12 CSR 10-102.100(3)(A). Furthermore, the issued decided by the Appellate Division of the New York Supreme Court is not the issue before us. Therefore, while the case is factually relevant, the legal issue is not on point because the regulation at issue differs from 12 CSR 10-102.100(3)(A), and the issue upon which the Court ruled is different from the issue before us.

In ***Magee v. Home Depot USA, Inc.***,[52] the taxpayer remitted sales tax on merchandise sold at retail, to accounts on credit. These accounts on credit were owned by a PLCC issuer. The PLCC issuer extended credit to the customers and reimbursed the taxpayer for the amount of purchase plus sales tax minus a service fee. Some of these accounts were uncollectable and deducted as bad debt on the PLCC issuer's federal income tax. The taxpayer requested a refund of sales tax paid on these bad debts. The regulation at issue, Ala. Admin. Code r. 810-6-4-.01,[53] provides:

> (1) The term "bad debt or uncollectible account" as used in this rule shall mean any portion of the sales price of a taxable item which **the retailer cannot collect**. Bad debts include, but are not limited to, worthless checks, **worthless credit card payments**, and uncollectible credit accounts. Bad debts, for sales and use tax purposes, do not include finance charges, interest, or any other nontaxable charges associated with the original sales contract, or

[51] 68 A.D.3d at 1572-73.
[52] 95 So.3d 781 (Ala. Civ. App. 2011).
[53] Alabama Administrative Code (1998).

> expenses incurred in attempting to collect any debt, debts sold or assigned to third parties for collection, or repossessed property.
>
> * * *
>
> (3) The term "credit sale" shall include all sales in which the **terms of the sale provide for deferred payments of the purchase price**. Credit sales include installment sales, conditional sales contracts, and revolving credit accounts.
>
> * * *
>
> (5) In the event a retailer reports and pays the sales or use tax on credit accounts which are later determined to be uncollectible, the retailer may take a credit on a subsequent tax report or obtain a refund for any tax paid with respect to the taxable amount of the unpaid balance due on the uncollectible credit accounts within three years following the date on which the accounts were charged off as uncollectible for federal income tax purposes.
>
> (6) If **a retailer recovers** in whole, or in part, amounts previously claimed as bad debt credits or refunds, the amount collected shall be included in the first tax report filed after the collection occurred. (Sections 40-23-8 and 40-23-68(e)). [Emphasis added.]

On the surface, Ala. Admin. Code r. 810-6-4-.01(5) seems similar to 12 CSR 10-102.100(3)(A). However, the Alabama regulation contains other sections, to which the Alabama Court of Civil Appeals looked, in determining that Ala. Admin. Code r. 810-6-4-.01(5) applied only when the taxpayer wrote off the uncollectible accounts as bad debt. First, it looked to subsection (1), which defined bad debt as requiring that the retailer be the entity that cannot collect the bad debt or worthless credit card payments. The Court held that, in this case, the retailer was not the entity unable to collect and that the credit card payments were not worthless because the payments from the PLCC issuer to the taxpayer were not worthless. Therefore, the uncollectible accounts did not fall under the regulation's definition of bad debt.[54] Second, the Court looked to

[54] 95 So.2d at 792-793.

subsection (3), which defined credit sale as requiring deferred payments between the customer and taxpayer. The Court held that, in this case, the taxpayer received immediate payment from the PLCC issuer, and therefore, these uncollectible accounts did not fall under the regulation's definition of credit sale.[55] Finally, the Court looked to subsection (6), which refers to a retailer's collection of amounts on previously claimed bad debt credits and held that the taxpayer must own the bad debt in order to obtain a refund under this regulation.[56] The definitions contained in Ala. Admin. Code r. 810-6-4-0.1(1) and (3) do not exist in the definitions contained in 12 CSR 10-102.100(2). Furthermore, 12 CSR 10-102.100(3)(B) does not limit collection on previously claimed bad debt to retailers and does not use any other term that would limit such collection to only the taxpayer. Therefore, while the case is factually relevant, the legal issue is not on point because the regulation at issue differs from 12 CSR 10-102.100(2) and (3)(B).

In ***Home Depot USA, Inc. v. Finance and Administration Cabinet, Department of Revenue***,[57] the taxpayer remitted sales tax on merchandise sold at retail, to accounts on credit. These accounts on credit were owned by a PLCC issuer. The PLCC issuer extended credit to the customers and reimbursed the taxpayer for the amount of purchase plus sales tax minus a service fee. Some of these accounts were uncollectable and deducted as bad debt on the PLCC issuer's federal income tax. The taxpayer requested a refund of sales tax paid on these bad debts. The statute at issue, KRS 139.350,[58] provides:

> (1) A retailer may deduct as a bad debt the amount found to be worthless and charged off for income tax purposes provided the retailer is reporting and remitting the tax on the accrual basis. **The retailer may take the deduction on the return for the period during which the bad debt is written off as uncollectable in the retailer's books and records and is eligible to be charged off for income tax purposes.** For purposes of this section, "charged off

[55] 95 So.2d at 793.
[56] *Id.*.
[57] 2012 WL 5213018 (Ky.Bd.Tax.App. Oct. 17, 2012).
[58] Kentucky Revised Statutes (1960).

> for income tax purposes" includes the charging off of unpaid balances due on accounts determined to be uncollectable, or declaring as uncollectable the unpaid balance due on accounts if a retailer is not required to file federal income tax returns. [Emphasis added.]

This statute allowed for a sales tax refund if the taxpayer, as the retailer, is the entity that writes off uncollectable accounts as bad debt. Accordingly, the Kentucky Board of Tax Appeals held:

> [Taxpayer] neither wrote these bad debts off as losses on its books nor on its income tax returns, and it has not, therefore, met the statutory requirements for the bad debt deduction as they presently exist.[59]

The requirement that the taxpayer be the entity that writes off uncollectible accounts as bad debt is not present in 12 CSR 10-102.100(3)(A). Therefore, while the case is factually relevant, the legal issue is not on point because the statute at issue differs from 12 CSR 10-102.100(3)(A).

3. Category 3 – Taxpayer Seeks Refund, Statute or Regulation on Point

There are two contradictory cases that are factually relevant with statutes or regulations at issue that are on point with the facts before us.

In ***Home Depot USA, Inc. v. Arizona Department of Revenue***,[60] the taxpayer remitted sales tax on merchandise sold at retail, to accounts on credit. These accounts on credit were owned by a PLCC issuer. The taxpayer sold these accounts to the PLCC issuer for full payment minus a service fee. Some of these accounts were uncollectable and deducted as bad debt on the PLCC issuer's federal income tax. The taxpayer argued that the service fee paid to the PLCC issuer reimbursed the PLCC issuer for any future bad debts. The taxpayer requested a refund of sales tax paid on these bad debts. The regulation at issue, AAC R15-5-2011,[61] provides:

[59] 2012 WL 5213018 at 3.
[60] 287 P.3d 97 (Az. Ct. App. 2012).
[61] Arizona Administrative Code (1994).

> A. The deduction of a bad debt shall be allowed from gross receipts if the following conditions apply:
>
> 1. The gross receipts from the transaction on which the bad debt deduction is being taken have been reported as taxable;
>
> 2. The debt arose from a debtor-creditor relationship based upon a valid and enforceable obligation to pay a fixed or determinable sum of money; and
>
> 3. All or part of the debt is worthless.
>
> * * *
>
> F. Any recovery of a bad debt subsequent to a bad debt deduction shall be reported as taxable gross receipts when received.

The Arizona Court of Appeals looked to subsection (F) and concluded that a taxpayer should only reap the benefit of a bad debt deduction if it is also subject to tax liability for amounts later collected under subsection (F). The Arizona Court of Appeals stated:

> If we were to adopt Taxpayer's argument, then Taxpayer would reap the benefit of the bad debt deduction while simultaneously avoiding the risk of future tax liability on amounts later collected.[62]

Subsection (F) is similar to Missouri's 12 CSR 10-102.100(3)(B). Missouri's subsection (B), combined with 12 CSR 10-102.100(3)(A), for reasons discussed below, would indicate that, according to the Arizona Court of Appeals, Circuit City is not entitled to a refund of overpaid sales tax because it would not also be subject to tax liability for amounts later collected by the PLCC bank. This case is on point with the facts and legal issue before us.

In ***Home Depot USA, Inc. v. State of Michigan and State Treasurer***,[63] the taxpayer remitted sales tax on merchandise sold at retail, to accounts on credit. All of the sales tax at issue was remitted prior to September 30, 2009. These accounts on credit were owned by a

[62] 287 P.3d at 100.
[63] 2012 WL 1890219 (Mich.App. 2012).

PLCC issuer. Some of these accounts were uncollectable and deducted as bad debt on the PLCC issuer's federal income tax. The taxpayer requested a refund of sales tax paid on these bad debts. The statute at issue, MCL 205.54i,[64] provides:

> (1) As used in this section:
>
> (a) "Bad debt" means any portion of a debt that is related to a sale at retail taxable under this act … that is eligible to be claimed, or could be eligible to be claimed if the taxpayer kept accounts on an accrual basis, as a deduction pursuant to section 166 of the internal revenue code[.]
>
> (b) Except as provided in subdivision (c), "lender" includes any of the following:
>
> * * *
>
> (*iii*) The issuer of the private label credit card.
>
> * * *
>
> (e) "Taxpayer" means a person that has remitted sales tax directly to the department on the specific sales at retail transaction for which the bad debt is recognized for federal income tax purposes or, **after September 30, 2009**, a lender holding the account receivable for which the bad debt is recognized, or would be recognized if the claimant were a corporation, for federal income tax purposes. [Emphasis in added.]

Because the sales tax refund amounts at issue in ***Michigan State Treasurer*** were remitted by the taxpayer prior to September 30, 2009, the statutory definition of taxpayer as including a PLCC issuer was not applicable to this case. Therefore, the Michigan Court of Appeals looked to its own prior opinion, ***DaimlerChrysler Services North America, LLC v. Dep't. of Treasury***,[65] which, in turn, looked to the definitions of "taxpayer" and "person" under Michigan's General Sales Tax Act ("MSTA").[66] Under these definitions, taxpayer was defined as a person subject to sales tax, and person was defined as:

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[64] Michigan Compiled Laws (2007).
[65] 723 N.W.2d 569 (Mich.App. 2006).
[66] MCL 205.51(1)(a) and (m).

> [A]n individual, firm, partnership, joint venture … *or any other group or combination acting as a unit*[.][67]

Under these definitions, the Michigan Court of Appeals in ***Dep't. of Treasury*** held that, "two taxpayers may be treated as one taxpayer or 'person' for the purpose of collecting the appropriate tax."[68] Borrowing from this analysis, the Michigan Court of Appeals, in ***Michigan State Treasurer***, held:

> [In [***Dep't. of Treasury***], the Court essentially concluded that parties acting in concert could be viewed as a unit, in some respects, for purposes of the bad-debt statute.[69]

Accordingly, the Michigan Court of Appeals in ***Michigan State Treasurer*** went on to affirm the trial court's ruling in favor of the taxpayer under the theory that the taxpayer did suffer the loss taken as a bad debt deduction by the PLCC issuer. Regulation 12 CSR 10-102.100(3)(A) refers to "seller" rather than "taxpayer." However, "seller" is defined by § 144.010.1(12) as a "person." "Person" is in turn defined by § 144.010.1(7) to include, "…any other group or combination acting as a unit…" Therefore, with the similarities of definitions between MSTA, § 144.010, and 12 CSR 10-102.100, this case is on point with the facts and legal issue before us.

4. Arizona case law v. Michigan case law

"While we are not bound to follow the decisions of a sister state, they are persuasive, if based on sound principles and good reason."[70] Likewise, "[while] out-of-state appellate decisions do not constitute controlling precedent in Missouri courts . . . they may be persuasive when the facts are similar, and when they are based on 'sound principles and good reason.'"[71]

Arizona Department of Revenue provides a meaningful analysis to our decision because 12 CSR 10-102.100(3)(B), similar to AAC R15-5-2011(F), requires that, if a bad debt refund is

[67] 723 N.W.2d at 575, quoting MCL 205.51(1)(a).
[68] *Id.* at 576.
[69] 2012 WL 1890219 at 6.
[70] ***Missouri Tp., Chariton County v. Farmers' Bank of Forest Green***, 42 S.W.2d 353, 356 (Mo. 1931).
[71] ***Craft v. Philip Morris Companies, Inc.***, 190 S.W.3d 368, 380 (Mo.App. E.D.2005).

given, then it must later be reported as a taxable sale if the debt is later collected. Under the facts before us, if we provide a sales tax refund to Circuit City, and the PLCC Bank later collects, Circuit City will not be in a position to report this collection as a taxable sale on its next return. The Arizona Court of Appeals felt that such a situation is contrary to the law. However, bad debt, as written off by the PLCC Bank, is defined by 26 USC § 166(a)[72] as:

> 1) WHOLLY WORTHLESS DEBTS
> There shall be allowed as a deduction any debt which becomes worthless within the taxable year.
>
> (2) PARTIALLY WORTHLESS DEBTS
> When satisfied that a debt is recoverable only in part, the Secretary may allow such debt, in an amount not in excess of the part charged off within the taxable year, as a deduction.

As worthless debts, the likelihood that the PLCC Bank will later recover the uncollected sales tax, which in turn would result in a windfall to Circuit City, is extremely low, if any. Therefore, the analysis of the Arizona Court of Appeals is not a realistic concern based on sound principles and good reason.

Michigan State Treasurer is unpublished, although it has not received negative treatment by later cases. The Michigan Supreme Court denied application for leave to appeal ***Michigan State Treasurer***, stating:

> On order of the Court, the application for leave to appeal the May 24, 2012 judgment of the Court of Appeals is considered, and it is DENIED, because we are not persuaded that the question presented should be reviewed by this Court.[73]

Because it received no negative treatment, we presume ***Michigan State Treasurer*** is unpublished because the Michigan Court of Appeals issued this opinion in 2012 and the statute at issue was

[72] United States Code.
[73] ***Home Depot USA, Inc. v. State of Michigan and State Treasurer***, 821 N.W.2d 664 (Mich. 2012).

amended effective 2009. Therefore, ***Michigan State Treasurer*** remains persuasive to the facts before us.

By applying the logic of ***Michigan State Treasurer*** to Missouri law, we come to the following analysis. Regulation 12 CSR 10-102.100(3)(A) allows a refund of overpaid sales tax to a seller. "Seller" is defined as, "a person selling or furnishing tangible personal property or rendering services, on the receipts from which a tax is imposed pursuant to section 144.020[.]"[74] "Person," in turn, is defined as, "any … corporation … or any other group or combination acting as a unit, and the plural as well as the singular number[.]"[75]

Circuit City is a corporation that fits the definition of person when acting alone. However, "person" also includes any group or combination acting as a unit and includes the plural as well as the singular number. As such, Circuit City and the PLCC Bank, acting as a unit, fit the definition of "person." Next, there is no dispute that Circuit City was legally obligated to remit sales tax. Therefore, there is no dispute that Circuit City and the PLCC Bank, acting as a unit, was a person that fits the definition of "seller." As a seller, Circuit City and the PLCC Bank, acting as a unit, qualify for a sales tax refund under 12 CSR 10-102.100(3)(A), if they meet the two requirements of this regulation: that it reported and remitted sales tax at the time of sale and the sales were written off as bad debts.

Circuit City reported and remitted sales tax at the time of sale. The PLCC Bank wrote off some of these sales as bad debts. Both Circuit City and the PLCC Bank, acting as a unit, are a person. As such, they are a seller that is entitled to a sales tax refund on overpaid sales tax under 12 CSR 10-102.100(3)(A).

[74] Section 144.010.1(11), RSMo Supp. 2005.
[75] Section 144.010.1(6), RSMo Supp. 2005.

C. Extrapolation

The Director argues that, by using extrapolation, Circuit City has not provided reliable information as to the amount of sales tax refund due. While neither party has provided case law on this issue, the Director has used extrapolation in the past to determine the amount of tax owed by a taxpayer.

In ***Luke M. Zimmerman, d/b/a Zimmerman Excavating v. Director of Revenue***,[76] the Director determined the amount of use tax that taxpayer owed for a 5-year period, April 1, 2004, to March 31, 2009, by simply reviewing the taxpayer's invoices for 2007 and 2008. In two other cases, ***Balloons Over the Rainbow, Inc. v. Director of Revenue***,[77] and ***Jostens, Inc. v. Director of Revenue***,[78] the Director and taxpayers jointly agreed to use extrapolation to determine the amount of sales tax refund at issue or the amount of sales tax and use tax owed.

The Director has used extrapolation to determine tax liability in the past, and we have allowed it. Until we are provided with different direction from above, we find Circuit City may determine the amount of overpaid sales tax it is owed through extrapolation.

Summary

Circuit City Stores is entitled to a refund of overpaid sales tax in the amount of $145,581.68 under 12 CSR 102.100(3)(A) and as calculated by extrapolation.

SO ORDERED on August 21, 2013.

\s\ *Sreenivasa Rao Dandamudi*
SREENIVASA RAO DANDAMUDI
Commissioner

[76] 10-0205 RS (July 22, 2011).
[77] 11-1342 RS (Nov. 27, 2012).
[78] 90-1873 RS (March 17, 1993).